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7 Attorneys for Plaintiffs Robert Marzec, et al.,  
8 individually and on behalf of a class of  
9 others similarly situated

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 FOR THE COUNTY OF LOS ANGELES

12 ROBERT MARZEC, an individual; RACHEL ) Case No.: BC 461887  
13 HEALY, an individual; BENJAMIN ) [Consolidated with BC 480695]  
14 ESPARZA, an individual; JEFFREY E. )  
15 ANDERT, an individual; NEIL MacLAREN, ) **CLASS ACTION**  
16 an individual; RANDY SLAUGHTER, an ) (Assigned to the Hon. Maren E. Nelson,  
17 individual; and HENRY BROWN, an ) Department 307, for all purposes)  
18 individual; and on behalf of a class of others )  
19 similarly situated, )  
20 ) **REQUEST FOR JUDICIAL NOTICE IN**  
21 ) **SUPPORT OF MOTION FOR CLASS**  
22 ) **CERTIFICATION**  
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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

Please take notice that on the date to be set by the Court for the hearing on Plaintiffs' concurrently filed *Motion for Class Certification* or as soon thereafter as the matter may be heard

1 in Department 307 of the Los Angeles Superior Court, Central Civil West, 600 S. Commonwealth  
2 Ave., Los Angeles, CA 90005, courtroom of the Hon. Maren Nelson, presiding, Plaintiffs Robert  
3 Marzec, Rachel Healy, Benjamin Esparza, Jeffrey E. Andert, Neil MacLaren, Randy Slaughter,  
4 and Henry Brown, individually and on behalf of a class of others similarly situated, will request  
5 that the Court take Judicial Notice of the following documents, which are attached to the  
6 concurrently filed *Notice of Lodging* as **Exhibits 3, 4 and 6**, in support of Plaintiffs' *Motion for*  
7 *Class Certification*.

8 **Exhibits 3, 4 and 6** are court records, official records and official acts of government  
9 agencies that are proper matters for mandatory or discretionary judicial notice under *Evidence*  
10 *Code* sections 450, et seq.

11 The documents that are subject of this Request for Judicial Notice are:

12 1. **Exhibit 3** is a true and complete copy of the Request for Judicial Notice  
13 filed by defendant CalPERS in this case on May 3, 2012 in support of CalPERS'  
14 Demurrer to Plaintiffs' First Amended Complaint. It contains documents relating to  
15 certain legislative history involving the Public Employees' Retirement Law ("PERL")  
16 concerning investment of monies for military/airtime by CalPERS members, and whether  
17 such investors were able to seek refunds of the monies invested if they retired with IDR.

18 Although the Court granted judicial notice of the documents at the time,  
19 Plaintiffs are renewing the request for judicial notice to bring the documents once again  
20 to the Court's notice in regard to Plaintiffs' *Motion for Class Certification*.

21 2. **Exhibit 4** is a true and complete copy of CalPERS' publication, "A Guide  
22 to CalPERS Pension Facts, 2010-2011" which contains estimates of the numbers of  
23 safety members who invested in airtime between 2003 and 2011, an issue which bears  
24 directly on the size of the putative class herein.

25 3. **Exhibit 6** is a true and complete copy of *In re Application of Smith*,  
26 CalPERS' Precedential Decision No. 99-01 01 (March 31, 1999) in which CalPERS  
27 adopted the Administrative Law Judge's *Proposed Decision* as a precedential decision  
28 which states that CalPERS' "duty to inform and deal fairly with members also requires

1 that the information conveyed be complete and unambiguous".

2 True and correct copies of the documents are concurrently attached to the Declaration of  
3 John Michael Jensen herein.

4 These requests are further based on the attached Memorandum of Points and Authorities  
5 and Declaration of John Michael Jensen in Support Thereof, on this Court's complete record and  
6 file herein, and upon such further oral and documentary evidence as may be presented at the  
7 hearing of this motion.

8 Respectfully submitted,

9  
10 Dated: October 3, 2017

By: \_\_\_\_\_  
John Michael Jensen,  
Attorney for Plaintiffs

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiffs ask the Court to take Judicial Notice of (a) legislative history, court records,  
3 and official records, including official records and acts of defendant CalPERS, an agency of the  
4 State of California; the state Legislature; and this Court.

5 **FACTS**

6 **Exhibits 3, 4 and 6**, attached to the concurrently filed *Notice of Lodging*, are records that  
7 are proper matters for judicial notice under *Evidence Code* sections 450, et seq.

8 1. **Exhibit 3** is a true and complete copy of the Request for Judicial Notice  
9 filed by defendant CalPERS in this case on May 3, 2012 in support of CalPERS'  
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24 which states that CalPERS' "duty to inform and deal fairly with members also requires  
25 that the information conveyed be complete and unambiguous".

26 **LAW AND ARGUMENT**

27 Plaintiffs seek for the Court to recognize and accept for use by the trier of fact or by the  
28 Court of the existence of various matters of law or fact. (*Evidence Code*, §§450, et seq; *People v.*

1 *Rowland* (1992) 4 Cal.4<sup>th</sup> 238, 268.)

2 **I. Request for Judicial Notice**

3 Plaintiffs seek for the Court to recognize and accept for use by the trier of fact or by the  
4 Court of the existence of various matters of law or fact. (*Evidence Code*, §§450, *et seq*; *People v.*  
5 *Rowland, supra*, at 268.)

6 Plaintiffs request Judicial Notice of various official records, court records, and other  
7 records including official records and acts of the State of California, of California courts,

8 The documents attached qualify for discretionary judicial notice under *Evidence Code*  
9 section 452 as: (1) official records of legislative, executive, and judicial departments of United  
10 States or any state; and (2) official acts of legislative, executive, and judicial departments of  
11 United States or any state.

12 (1) *California and Federal Government Agencies' Official Records and*  
13 *Reports*. Judicial notice may be taken of official reports and publications by  
14 government agencies. (*Arce v. Kaiser Found. Health Plan, Inc. (2010) 181 Cal.App.4th*  
15 *471, 484.*) Under *Evidence Code*, §452(c), the trial court may take judicial notice of the  
16 records and files of a state entity. (*Fowler v. Howell (1996) 42 Cal.App.4th 1746,*  
17 *1750.*)

18 (2) *California and Federal Government Agencies' Official Acts*. Judicial  
19 notice may be taken of official acts by government agencies. (*Arce v. Kaiser Found.*  
20 *Health Plan, Inc., supra*, at 484.) To the degree that the filings in the request for  
21 judicial notice are the "official acts" of CalPERS, they are noticeable. (*Stevens v.*  
22 *Superior Court (1999) 75 Cal.App.4th 594, 607-608.*)

23 **Mandatory Judicial Notice.** *Evidence Code* § 451 requires that judicial notice be taken  
24 of the decisional, constitutional, and public statutory law of this state and of the United States.  
25 (See *Los Angeles v. San Fernando (1975) 14 Cal.3d 199; Young v. Boy Scouts of America (1935)*  
26 *9 Cal.App.2d 760.*)

27 The court is *required* to take judicial notice (even in the absence of a request to do so) of  
28 the following matters:

1            Legislative history: Where legislative history is published, a simple citation to the  
2 published source suffices for judicial notice (e.g., legislative history of federal legislation is  
3 published in U.S. Code Congressional and Administrative News). [*Mangini v. R.J. Reynolds*  
4 *Tobacco Co.* (1994) 7 C4th 1057, 1064, 31 CR2d 358, 362; *Quelimane Co., Inc. v. Stewart Title*  
5 *Guar. Co.* (1998) 19 C4th 26, 45, 77 CR2d 709, 720, fn. 9—citation to reports of Senate and  
6 Assembly committees sufficient]

7            **Discretionary judicial notice**: The court *may* (and “shall” if proper request is made, )  
8 take judicial notice of the following matters:

9            Court Records. The records of California courts and those of any court of record of the  
10 United States or any sister state are subject to judicial notice.

11            Thus, a court may take judicial notice of its own records not only in the action pending  
12 before it<sup>2</sup> but also in other proceedings. *Flores v. Arroyo*, 56 Cal. 2d 492, 15 Cal. Rptr. 87, 364  
13 P.2d 263 (1961) (disapproving prior decisions to the contrary); *People v. Smith*, 215 Cal. App. 3d  
14 19, 263 Cal. Rptr. 678 (1st Dist. 1989); *Bach v. McNelis*, 207 Cal. App. 3d 852, 255 Cal. Rptr.  
15 232 (3d Dist. 1989).

16            For example, an appellate court may take judicial notice of pleadings filed in related  
17 cases, an unpublished opinion from an unrelated case, a settlement agreement, the appellant's  
18 waiver of a jury trial, trial court docket entries, a complaint in intervention, even if the intervenor  
19 is not a party to the appeal, relevant documents filed in separate litigation between the parties, or  
20 other records in an unrelated action involving similar subject matter, the record of a previous  
21 appeal before the same court in the same case, the record on appeal of a companion case,  
22 documents filed in a mandamus proceeding an appellant had previously filed in the California  
23 Supreme Court, the settlement and dismissal of a related action, the federal court record of the  
24 same case currently being litigated in state court or in a related case, or the court's own prior  
25 opinion in the same case including an unpublished opinion. *31 Cal. Jur. 3d Evidence § 44*

26            State and Local Public Entities. Ev.C. 452(b), read in connection with the definition of  
27 “public entity” (infra, this section), authorizes notice of ordinances or any similar legislative  
28 enactments. (Law Rev. Com. Comment to Ev.C. 452; see Lab.C. 6304.5 [Ev.C. 452 applies to

1 occupational safety and health standards]; *Holmes v. Oakland* (1968) 260 C.A.2d 378, 384, 67  
2 C.R. 197 [city ordinance, to show control and duty of inspection of railroad right-of-way over  
3 city-owned land]; *Jordan v. Los Angeles* (1968) 267 C.A.2d 794, 798, 73 C.R. 516, citing the  
4 text; *Cooke v. Superior Court* (1989) 213 C.A.3d 401, 416, 261 C.R. 706 [county resolution]; 2  
5 C.E.B., Civ. Proc. During Trial 3d, § 14.18.)

6 Official acts: A court may take judicial notice of “official acts” of legislative, executive  
7 and judicial departments of the federal or any state government. [Ev.C. § 452(c); *Arce v. Kaiser*  
8 *Found. Health Plan, Inc.* (2010) 181 CA4th 471, 484, 104 CR3d 545, 557; *Scott v. JPMorgan*  
9 *Chase Bank, N.A.* (2013) 214 CA4th 743, 752-753, 154 CR3d 394, 402] “Official acts of the  
10 legislative, executive, and judicial departments of the United States and of any state of the  
11 United States” may be noticed. (Ev.C. 452(c); see 2 C.E.B., Civ. Proc. During Trial 3d, § 14.19.)  
12 Under the definition of “state,” this also covers territories and possessions. (See Ev.C. 220,  
13 supra, § 16.) Obviously, Ev.C. 452(c) partly overlaps Ev.C. 451(a) (supra, § 7). (See Law Rev.  
14 Com. Comment to Division 4.)

15 Official Reports and Publications. Judicial notice may be taken of *official reports and*  
16 *publications* by government agencies. [*Arce v. Kaiser Found. Health Plan, Inc.*, supra, 181  
17 CA4th at 484, 104 CR3d at 558—reports of legislative committees and commissions as part of  
18 statute's legislative history; *Carleton v. Tortosa* (1993) 14 CA4th 745, 753, 17 CR2d 734, 739,  
19 fn. 1—handbook published by California Department of Real Estate showing general areas  
20 tested on real estate brokers exam and code of ethics for licensees; *Casella v. SouthWest Dealer*  
21 *Services, Inc.* (2007) 157 CA4th 1127, 1137, 69 CR3d 445, 453—article published by DMV  
22 regarding disclosure requirements imposed on car dealers]

23 Legislative History. The Legislative history contained in the documents provided by the  
24 Secretary of State's office are legislative history that is proper subject of judicial notice. Since the  
25 documents were provided by the Secretary of State in groups that corresponded to how the  
26 original documents were kept, Plaintiffs have maintained the grouping determined by the  
27 Secretary of State, including as they were certified by the Secretary of State in those groups. The  
28 letters in these files were also statements by groups that were made widely available to the

1 Legislators. The enrolled bill reports are prepared by a responsible agency contemporaneous  
2 with the passage and before signing, and are generally instructive on matters of legislative intent.

3 **Relevance of the Documents For Which Judicial Notice is Sought**

4 The documents attached to the *Notice of Lodging* as **Exhibits 3 and 4** are relevant to this  
5 proceeding in that they support the arguments of Plaintiffs.

6 The legislative history included in **Exhibit 3** was previously granted judicial notice by  
7 this Court in 2012. Plaintiffs are bringing the materials before the Court again and requesting  
8 Judicial Notice in that they bear directly on the issue of the investment of monies for  
9 military/airtime by CalPERS members, and whether such investors were and are able to seek  
10 refunds of the monies invested if they retired with IDR.

11 The legislative history includes (1) the history of Senate Bill 394, introduced in February  
12 1979 and later enacted by the Legislature, which permitted the refund of investment monies from  
13 January 1, 1979 through January 1, 1984 (labeled as Exhibit 1 in CalPERS' prior RJN); (2) the  
14 history of Assembly Bill 1146, introduced in March 1991 but not enacted by the Legislature,  
15 which would have again permitted the refund of such investments (labeled as Exhibit 2 in  
16 CalPERS' prior RJN); and (3) the history of Senate Bill 268, introduced in February 2003 and  
17 later enacted by the Legislature, which permitted the suspension of prospective installment  
18 payments on such investments but denied refunds of any monies already paid toward such  
19 investments (labeled as Exhibit 3 in CalPERS' prior RJN).

20 That legislative history demonstrates that CalPERS was aware that safety officers who  
21 invested in military/airtime and later retired with IDR frequently received little or no benefit or  
22 advantage from their investments, and that the Legislature addressed the question of whether  
23 such individuals were entitled to seek refunds of the investment monies they had deposited with  
24 CalPERS. While the Legislature took varying positions on the eligibility for refunds at different  
25 points, all of the history demonstrates that CalPERS knew of the issue. Plaintiffs have alleged  
26 that CalPERS nevertheless failed to inform safety members of this fact, entitling Plaintiffs to  
27 rescission of the investment contracts and restitution, including interest.

28 **Exhibit 4** is relevant because it demonstrates that CalPERS estimated the numbers of



1 safety officers who had invested in airtime during the 8-year period of 2003-2011 and was aware  
2 that a significant number of safety officers had done so. Plaintiffs have alleged that CalPERS'  
3 knowledge of the significant number of safety members investing in airtime (as well as the  
4 unknown but significant numbers that also invested in military time) should have required  
5 CalPERS to provide notices to those safety members of the risks of loss or offset of their  
6 investments if they later were disabled and retired with IDR.

7 **Exhibit 6** is relevant because it demonstrates that CalPERS has adopted as its own  
8 precedential decision the *Proposed Decision* of the Administrative Law Judge in *In re*  
9 *Application of Smith*, CalPERS' Precedential Decision No. 99-01 01 (March 31, 1999), which  
10 states that CalPERS' "duty to inform and deal fairly with members also requires that the  
11 information conveyed be complete and unambiguous". Plaintiffs have alleged that CalPERS has  
12 breached its fiduciary duties, including the "duty to inform and deal fairly with members", bu  
13 failing to disclose the risk of loss or offset, risk of receiving no promised increase, and risk of no  
14 refund of putative class members' military/airtime investments prior to CalPERS contracting  
15 with those members.

### 16 **CONCLUSION**

17 We request that Court take Judicial Notice of **Exhibits 3, 4 and 6** that are proper matters  
18 for discretionary judicial notice under *Evidence Code* section 450, *et seq.*

19 Dated: October 3, 2017

20 By: \_\_\_\_\_  
21 John Michael Jensen,  
22 Attorney for Plaintiffs  
23  
24  
25  
26  
27  
28

1 **DECLARATION OF JOHN MICHAEL JENSEN**

2 I, JOHN MICHAEL JENSEN, declare as follows:

3 1. The statements herein are based upon my personal knowledge and if called to  
4 testify under oath in court I could and would so testify.

5 2. I am over 18 years old.

6 3. I am counsel of record for Plaintiffs and have been since the outset of this  
7 litigation.

8 4. I make this Declaration in support of Plaintiffs' *Request for Judicial Notice* in  
9 support of their *Motion for Class Certification*.

10 5. **Exhibits 3, 4 and 6**, attached to the concurrently filed *Notice of Lodging*, are  
11 official records and official acts of government agencies that are proper matters for judicial  
12 notice under *Evidence Code* sections 450, et seq.

13 6. **Exhibit 3** is a true and complete copy of the Request for Judicial Notice filed by  
14 defendant CalPERS in this case on May 3, 2012 in support of CalPERS' Demurrer to Plaintiffs'  
15 First Amended Complaint. It contains documents relating to certain legislative history involving  
16 the Public Employees' Retirement Law ("PERL") concerning investment of monies for  
17 military/airtime by CalPERS members, and whether such investors were able to seek refunds of  
18 the monies invested if they retired with IDR.

19 7. I have reviewed the legislative history contained in **Exhibit 3** and find that it  
20 bears directly on issues central to Plaintiffs' *Motion for Class Certification*.

21 8. The legislative history includes (1) the history of Senate Bill 394, introduced in  
22 February 1979 and later enacted by the Legislature, which permitted the refund of investment  
23 monies from January 1, 1979 through January 1, 1984 (labeled as Exhibit 1 in CalPERS' prior  
24 RJN); (2) the history of Assembly Bill 1146, introduced in March 1991 but not enacted by the  
25 Legislature, which would have again permitted the refund of such investments (labeled as  
26 Exhibit 2 in CalPERS' prior RJN); and (3) the history of Senate Bill 268, introduced in February  
27 2003 and later enacted by the Legislature, which permitted the suspension of prospective  
28 installment payments on such investments but denied refunds of any monies already paid toward

1 such investments (labeled as Exhibit 3 in CalPERS' prior RJN).

2 9. I believe that the legislative history demonstrates that CalPERS was aware that  
3 safety officers who invested in military/airtime and later retired with IDR frequently received  
4 little or no benefit or advantage from their investments, and that the Legislature addressed the  
5 question of whether such individuals were entitled to seek refunds of the investment monies they  
6 had deposited with CalPERS.

7 10. While the Legislature took varying positions on the eligibility for refunds at  
8 different points, all of the history demonstrates that CalPERS knew of the issue.

9 11. Plaintiffs have alleged that CalPERS nevertheless failed to inform safety members  
10 of this fact, entitling Plaintiffs to rescission of the investment contracts and restitution, including  
11 interest.

12 12. The legislative history included in **Exhibit 3** was previously granted judicial  
13 notice by this Court in 2012. Plaintiffs are bringing the materials before the Court again and  
14 requesting Judicial Notice in that they bear directly on the issue of the investment of monies for  
15 military/airtime by CalPERS members, and whether such investors were and are able to seek  
16 refunds of the monies invested if they retired with IDR.

17 13. **Exhibit 4** is a true and complete copy of CalPERS' publication, "A Guide to  
18 CalPERS Pension Facts, 2010-2011" which contains estimates of the numbers of safety members  
19 who invested in airtime between 2003 and 2011, an issue which bears directly on the size of the  
20 putative class herein.

21 14. On September 28, 2017, I downloaded downloaded the copy of **Exhibit 4** that is  
22 attached to the *Notice of Lodging* from [http://www.nasra.org/files/State-](http://www.nasra.org/files/State-Specific/California/Pension-facts%20CalPERS.pdf)  
23 [Specific/California/Pension-facts%20CalPERS.pdf](http://www.nasra.org/files/State-Specific/California/Pension-facts%20CalPERS.pdf).

24 15. I believe that **Exhibit 4** demonstrates that CalPERS estimated the numbers of  
25 safety officers who had invested in airtime during the 8-year period of 2003-2011 and was aware  
26 that a significant number of safety officers had done so.

27 16. Plaintiffs have alleged that CalPERS' knowledge of the significant number of  
28 safety members investing in airtime (as well as the unknown but significant numbers that also

1 invested in military time) should have required CalPERS to provide notices to those safety  
2 members of the risks of loss or offset of their investments if they later were disabled and retired  
3 with IDR.

4 17. **Exhibit 6** is relevant because it demonstrates that CalPERS has adopted as its  
5 own precedential decision the *Proposed Decision* of the Administrative Law Judge in *In re*  
6 *Application of Smith*, CalPERS' Precedential Decision No. 99-01 01 (March 31, 1999), which  
7 states that CalPERS' "duty to inform and deal fairly with members also requires that the  
8 information conveyed be complete and unambiguous".

9 18. I believe that by adopting the *Proposed Decision* in *In re Smith* as precedential,  
10 such that it should govern CalPERS' decisions and actions in similar cases, CalPERS has  
11 acknowledged that it owes fiduciary duties to its membership to fully inform them and to deal  
12 fairly with them by providing them with complete and unambiguous information in matters  
13 related to those members' pension rights and benefits.

14 19. Plaintiffs have alleged that CalPERS has breached its fiduciary duties, including  
15 the "duty to inform and deal fairly with members", bu failing to disclose the risk of loss or offset,  
16 risk of receiving no promised increase, and risk of no refund of putative class members'  
17 military/airtime investments prior to CalPERS contracting with those members.

18 I hereby certify under penalty of perjury under the laws of the State of California that the  
19 foregoing is true and correct.

20 DATED: October 3, 2017

21 \_\_\_\_\_  
22 John Michael Jensen, SBN 176813